IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-616

MOHASCO CORPORATION, *Petitioner,*

v.

RALPH H. SILVER, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENT RALPH H. SILVER

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OPINIONS BELOW

The Opinion of the District Court for the Northern District of New York of October 17, 1978, granting Mohasco Corporation's (hereinafter "Mohasco") Motion for Summary Judgment, is reported unofficially at 119 FEP Cases 677 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert.Pet.App. A1-A22). The Opinion of the Court of Appeals of July

18, 1979, reversing the trial court, is officially reported at 602 F.2d 1083 and unofficially reported at 20 FEP Cases 464 and 20 CCH EPD ¶ 30, 137, and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert.Pet.App. A23-A44).

STATUTES INVOLVED

The case involves the interpretation of provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"), specifically § 706(c), 42 U.S.C. § 2000e-5(c) and § 706(e), 42 U.S.C. § 2000e-5(e). Those sections provide in relevant part:

> § 706(c) In the case of an alleged unlawful employment practice occuring in a State . . . which has a State . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law, unless such proceedings have been terminated. . . .
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> * * *
>
> § 706(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State . . . agency with authority to grant or seek relief from

> such practice . . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State . . . agency has terminated the proceedings under the State . . . law, whichever is earlier. . . .

These statutory provisions are set forth in full in Appendix B to the Petition for a Writ of Certiorari (Cert.Pet.App. A51-A52).

QUESTION PRESENTED

In states having fair employment practices agencies, does an aggrieved person have 300 days from the occurrence of the alleged unlawful employment practice within which to file a charge with EEOC in order to invoke a federal remedy, or must the charge be filed within a shorter time, 240, 180, or some other number of days for that purpose?

STATEMENT OF THE CASE

Respondent, Ralph H. Silver ("Silver") was employed by petitioner, Mohasco Corporation ("Mohasco") as an economist. He was discharged on August 29, 1975 after thirteen months of employment. Silver, who is Jewish, claims that his employment was marked by harassment and abuse intended to force his resignation from the position he characterizes as a "minority slot", created to give the appearance that Mohasco was in compliance with Title VII. Silver claims that he was hired and subsequently discharged because

of his religion, both acts integral to the scheme by which Mohasco sought to create the fiction of its commitment to equal employment opportunity for Jews and other minorities. (App. 3-5; 13-14). Silver additionally claims that following his unlawful discharge Mohasco disseminated false and derogatory references to prospective employers, and advised them that he was Jewish, as if this fact would justify Silver's termination.

On June 15, 1976, 291 days after his discharge, Silver filed a charge with the District Office of the Equal Employment Opportunity Commission ("EEOC") in Buffalo, New York, in the form of a letter dated June 10, 1976, alleging that he had been both hired and fired by Mohasco because of his religion. (App. 3).[1] That same day, EEOC mailed a copy of his charge to the New York State Division of Human Rights ("State Division") in accordance with its standard practice and in compliance with Title VII deferral procedures. EEOC also advised the State Division that it would automatically assume jurisdiction over the charge at the end of the 60-day deferral period, or earlier, if the State Division terminated its proceedings sooner. (App. 7). On June 16, 1976, EEOC notified Silver of its deferral to the State Division. (App. 9).

On August 20, 1976, EEOC began formal processing of Silver's charge. (App. 15). On February 9, 1977,

[1] The timeliness of Silver's charge of black-listing in connection with references provided to prospective employers is not presented here. This Court denied the Petition for Writ of Certiorari as to that aspect of the decision of the Court of Appeals.

the State Division issued a determination finding "no probable cause to believe that Silver had been terminated on account of his religion." (Cert. Pet. App. A45). EEOC, on August 24, 1977, without further investigation, adopted the State Division's determination and notified Silver of his right to sue in the Federal District Court. (Cert. Pet. App. A49). Within 90 days of receipt of the right to sue letter, Silver commenced this action *pro se* in the United States District Court for the Northern District of New York, alleging violations of his rights under Title VII.

The District Court, without reaching the merits, granted summary judgment to Mohasco on the ground that Silver did not file a timely charge under Section 706(e), thus depriving the District Court of jurisdiction over the Title VII suit.[2] (Cert. Pet. App. A1-22).

On appeal, the Second Circuit (Judge Meskill dissenting) reversed the decision of the District Court, holding that Silver's charge was timely filed with the EEOC.

SUMMARY OF ARGUMENT

The filing requirements of Title VII, which determine access to the federal courts and to a federal remedy for complaints of employment discrimination, have caused considerable confusion and uncertainty.

[2] Silver's suit as to the individual defendants (five Mohasco managers) was dismissed by the District Court on other grounds, and is not relevant to the question presented herein. (Cert. Pet. App. A3-A6).

The confusion stems from Title VII's statutory scheme. Different filing periods are provided depending upon whether or not the state in which the unlawful act is alleged to have occurred has a state or local agency to process the complaint. It is undisputed that these different filing requirements reflect Congressional intent that state or local agencies be given initial opportunity to act to resolve the claim.[3] The particular source of difficulty is that Congress adopted two subsections[4] to the provision entitled Prevention of Unlawful Employment Practices, both of which establish time limits framed in terms of "filing" with EEOC.

Section 706(c) in pertinent part provides:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local authority to grant or seek relief from such practice . . . *no charge may be filed* . . . [with the EEOC] by the person aggrieved *before the expiration of sixty days after the proceedings have been commenced under State or local law,* unless such proceedings have earlier terminated, provided that such sixty-day period shall be extended to one hundred twenty days during the first year after the effective date of such State or local law. . . . (emphasis added)

[3] See remarks of Senator Humphrey, "First, we were concerned that states and localities be afforded every opportunity to resolve these difficult problems . . . by means of their own agencies and instrumentalities." 110 Cong. Rec. 12714 (1964).

[4] Prior to the 1972 amendment, 86 Stat. 103, the time limitations now provided in Section 706(e) were found in Section 706(d). The amendment renumbered the section and extended the limitations periods from 90 and 200 days to 180 and 300 days respectively. No other change was made in Section 706(e). Section 706(c) was renumbered from Section 706(b) without other change.

Section 706(e) provides:

> A charge filed under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . ., such charge *shall be filed* by or on behalf of the aggrieved party *within three hundred days* after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . . (emphasis added)

The sections have different purposes. Section 706(c), which effectuates the policy of allowing state and local authorities the first opportunity to resolve employment discrimination complaints, grants a fixed time of exclusive jurisdiction to the local agency before EEOC may act; Section 706(e) establishes time limitations within which a charge must be "filed" with EEOC to permit a complainant to seek a federal remedy.

The procedural questions of timely filing under Section 706(e) arise only in deferral states. An employee, and EEOC, in a state without an appropriate state agency have clear instructions: the charge must be filed with EEOC within 180 days after occurrence of the discriminatory act.

It is the employee in a deferral state whose right to a federal remedy has been subject to such differing interpretations as reflected in the District Court and Circuit Court decisions in this case. While the statute appears to give 300 days within which to file with EEOC, and the EEOC by regulation has adopted that construction, employers, as here, have asserted two defenses: one, that the filing is untimely because the 300 day period of Section 706(e) does not mean 300 days from the date of the occurrence of the act complained of; and two, that the initial filing was with the wrong agency.

Those courts addressing the issue of the filing requirements frequently have been inspired to an eloquence not often encountered in discussions of procedural questions. The technical requirements have been described, for example, as holding victims of discrimination "accountable for a procedural prescience that would have made a Baron Parke or a Joseph Chitty proud". *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 892 (2d Cir. 1971).

This case presents a classic example of the kinds of problems that have been the subject of extensive litigation. Silver filed a charge with EEOC within 300 days after his discharge from Mohasco. EEOC considered his charge timely and deferred the charge to the State Division; upon completion of the deferral period, EEOC acted upon Silver's charge, ultimately issuing to him a right to sue letter.

Indisputably, Silver's right to a federal remedy is not dependent upon the outcome of the state agency

proceedings. *Alexander* v. *Gardner Denver*, 415 U.S. 36, 44-47 (1974). Moreover, the fact that Silver's charge was submitted first to EEOC, which forwarded it to the State Division, should be of no legal consequence.[5] *Love* v. *Pullman*, 404 U.S. 522, 525-26 (1972). What remains for final disposition then is the question of whether the word "filed" in §706(e) means "delivered to", or whether, because it is also used in Section 706(c), it must be given a different meaning. If the phrase "no charge may be filed" in Section 706(c) is read literally, that is, filing with EEOC is not permitted within the 60-day state agency deferral period, then a charge "filed" within the 300 days permitted by Section 706(e) is untimely, since the 300 days is necessarily reduced by the 60-day deferral period. Viewed from this perspective, a complainant must "file" within 240 days after the alleged discriminatory act.

It has been variously contended that the meaning of Section 706(e) is "plain" or "clear", or if ambiguous, must be construed narrowly. Contenders for the proposition that the "plain meaning" requires restrictive application argue that the word "filed" must be given the same meaning in both Sections 706(c) and (e). The result would be to hold that Silver's claim could not have been "filed" with EEOC until 60 days after EEOC

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[5] The District Court below, while acknowledging what appeared to be "anomalous procedural modes", held that if on June 15, 1976, Silver had gone directly to the State Division, and thereafter, within 8 days, notified EEOC, his charge would have been deemed filed on the 300th day after his discharge, and would have been timely. (Cert. Pet. App. A11).

deferred his charge to the State Division. This interpretation would have required Silver's claim to reach the state agency within 240 days after his discharge to have been timely, or to risk forfeiture if the state took the full 60 days of its deferral period. Mohasco also expresses another view of the plain meaning of Section 706(e); that it requires a charge in a deferral state to be filed within 180 days of the occurrence of the unlawful act, either with EEOC *or* with the state agency. In short, Mohasco postulates that an aggrieved person must "file somewhere" within 180 days in order to file a timely charge with EEOC.[6]

Arguments for literal equation of the words in the different sections would result in requiring filing in a deferral state within 240 days of the act complained of so as to allow the state agency 60 days of exclusive jurisdiction, although the figure 240 is found nowhere in the statute. The alternative, even more restrictive view, would eliminate entirely the distinction made by §706(e) between time for filing in deferral and in non-deferral states by compelling filing "somewhere" within 180 days.

Others, who also argue that the meaning is plain or clear, or if not, that any ambiguity must be resolved in favor of the aggrieved employee, would read the word "filed" in §706(e) as meaning "received" or "delivered to" for the purpose of measuring timely filing by the complainant. This interpretation would also require

[6] Brief of Petitioner, pp. 29-38; *See also* Amicus Curiae, Equal Employment Advisory Council, p. 7.

EEOC to refrain from processing the charge for up to 60 days, but would read the word "filed" in §706(c) as meaning only that EEOC may not process the charge before the deferral period ends. This latter interpretation, adopted by the Second Circuit below, holds that delivery of the charge to EEOC within any time up to 300 days is timely for purposes of entitlement to a federal remedy.

Decisions of this Court, the legislative history of the 1972 amendments to the statutory provisions, and the administrative interpretations of EEOC, all compel the conclusion that the Second Circuit correctly held that a charge is "filed" for the purpose of §706(e) when received by EEOC, and "filed" for the purposes of §706(c), when the deferral period ends, thereby permitting EEOC to begin acting on the charge.

Argument

I. Section 706(e) Permits A Complainant In A Deferral State To Invoke Tittle VII Remedies By Delivering His Complaint To The EEOC Within 300 Days After The Occurrence Of The Alleged Unlawful Practice.

Introduction

Although Title VII was enacted to provide a federal remedy for discriminatory employment practices, Congress intended that an aggrieved employee first seek help from state or local agencies, if any were available. The

statutory scheme created by Congress relies on private, lay citizens for enforcement of the federal policy against discrimination; private litigation is the primary enforcement vehicle. Thus, courts interpreting Title VII have recognized that its procedural provisions, designed to give the federal, state and local governments an opportunity to remedy discrimination by administrative means, are secondary to the overriding purpose of creating a private right-of-action to enforce the law.

Having given to workers a federally protected right to be free of employment discrimination, Congress also gave to them the burden of comprehending what was expected in their efforts to seek redress under the new law. The aggrieved employee in a non-deferral state was fortunate; as to him the rules were reasonably clear. His counterpart in a state with a state or local agency, however, was in an unenviable position; he was caught in a welter of state filing requirements, EEOC regulations, and Title VII provisions, all of which became barriers to which employers could refer in turn. It has been observed that "to meet the Act's [filing] requirements, a plaintiff would need to have a Philadelphia solicitor in constant attendance and he might miss a turn even with this assistance." *Vigil* v. *AT&T,* 305 F.Supp. 44, 47 (D. Colo. 1969), *aff'd,* 445 F.2d 1222 (10th Cir. 1972).

Among the early questions of construction was whether a complainant in a deferral state was required to file with the state or local agency *before* going to the EEOC. This question was finally answered in *Love* v. *Pullman,* 404 U.S. 522 (1972), wherein it was held that a

charge filed initially with the EEOC may be held in "suspended animation" by the Commission and automatically referred by EEOC to the appropriate state agency. 404 U.S. at 526. After the 60-day deferral period ended, this Court held, EEOC may begin its own investigation. Thus, the Court protected the employee from the risk attendant upon having to file two different charges, each subject to its own complicated timetable.

That, of course, did not end the matter. Employers also sought to have the §706(e) filing requirements in deferral states narrowly restricted. Four circuits, prior to the case at bar, faced the questions which concern the meaning of "filed" as used in §706(c) and §706(e). Three circuits adoped a liberal interpretation allowing the claimant maximum possible benefit of the §706(e) filing limitation. In *Anderson* v. *Methodist Evangelical Hospital,* 464 F.2d 723 (6th Cir. 1972) and *Richard* v. *McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972),[7] the Sixth and Eighth Circuits relied on the equitable concept of tolling to prevent expiration of the statutory filing period, holding that the initial EEOC filing tolled the §706(e) time limitations during deferral to the state agencies. The Tenth Circuit in *Vigil* v. *AT&T* 455 F.2d 1222 (10th Cir. 1972), held that a complainant could file a valid charge with the EEOC within the state

[7] The Eighth Circuit has revised its interpretation in *Richard.* In *Olson* v. *Rembrant Printing Co.,* 511 F.2d 1228 (8th Cir. 1975) (en banc), it held that a complainant in a deferral state must file with either the state or EEOC within 180 days.

deferral period, and the *receipt* of the charge met the requirement of Section 706(d) [now 706(e)], even though EEOC could not proceed until the state agency had the complaint for 60 days. 455 F.2d at 1224.

Only the Seventh Circuit, in *Moore* v. *Sunbeam,* 459 F.2d 811 (7th Cir. 1972), in an opinion written by Justice Stevens, prohibited §706(e) filing with EEOC during the state deferral period.[8]

In considering the 1972 amendments to §706(c) of the Act, Congress expressly approved the constructions adoped in *Love* and *Vigil,* and thus provided the basis for the construction adopted by the Second Circuit in this case.

A. *Legislative History Of 1972 Amendments*

When Congress reexamined Title VII in advance of the major changes made in 1972, it expressly considered the time requirements established by §706(c) and §706(e). The Congressional intent expressed was that the deferral requirement of §706(c) was not intended to shorten the filing time permitted under §706(e) in a deferral state; its understanding that the language of 706(c) was not intended to bar a complainant from filing with EEOC *within the deferral period* was explicit.

As initially presented in the bill passed by the Senate, S. 2515, Section 706(c) would have been amended to read:

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[8] The Second Circuit in its *Silver* decision noted that the 1972 amendments were not in effect when *Moore* was decided and the Court did not consider their impact. (Cert. Pet. App. A33).

> (c) In the case of a charge filed by or on behalf of a person claiming to be aggrieved alleging an unlawful employment practice occuring in a State or political subdivision of a State which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . upon receiving notice thereof *the Commission shal! take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under the State or local law,* unless such proceedings have been earlier terminated, except that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. . . .

118 Cong. Rec. 290 (1972) (emphasis added). By eliminating the phrase "no charge shall be filed" [prior to the end of the deferral period], the Senate's language was intended to make it clear that a charge could be filed with the EEOC prior to deferral, and then held in abeyance without action by the EEOC until deferral had been completed. 118 Cong. Rec. 4941 (1972) (Section-by-Section Analysis). In discussing the new language, the Section-by-Section Analysis refers to "a similar holding by the Supreme Court in *Love* v. *Pullman Co.,*" *id.*

However, the House-Senate Conference rejected the change made by the Senate bill as *unnecessary.* As stated in the Conference Report,

> Sections 706(c) and (d) - These subsections, dealing with deferral to appropriate State and local equal

employment opportunity agencies, are identical to sections 706(b) and (c) of the Civil Rights Act of 1964. No change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love* v. *Pullman Co.*, _____ U.S. _____, 92 S. Ct. 616 (1972) which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, even though the language provides that no charge can be filed under section 706(a) [now Section 706(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. *Similarly, the recent circuit court decision in Vigil* v. *AT&T,_____ F.2d _____*, 4 FEP Cases 345 (10th Cir. 1972), *which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in section 706(c) and (d) [i.e., present Section 706(e)], a charge filed with a State or local agency may also by filed with the EEOC during the 60-day deferral period, is within the intent of this Act.*

118 Cong. Rec. 7564 (1972) (emphasis added) (Section-by-Section Analysis)[9] Thus, the Conference Committee, in reporting on the bill that was eventually passed without further change by both Houses, expressly approved *Vigil, supra,* and concurred in *Vigil's* holding

[9] The citation is to the Conference Report as submitted to the House of Representatives. The same Section-by-Section Analysis was submitted to the Senate by Senator Williams, the Senate sponsor, at 118 Cong. Rec. 7166-7168 (1972).

that the language "no charge may be filed" appearing in Section 706(c) does *not* prevent filing during the deferral period to satisfy the Section 706(e) time requirements. The deferral provision, in short, simply has no bearing on filing for purposes of complying with the statute of limitations contained in Section 706(e).[10]

Inasmuch as this Court has held that the Section-by-Section analysis provides "the final and conslusive confirmation of the meaning" of the statute, *Occidental Life Insurance* v. *EEOC,* 432 U.S. 355, 365 (1977), the express endorsement by Congress of the constructions of the filing requirements by this Court in *Love* v. *Pullman* and of the Tenth Circuit in *Vigil* should have put to rest the question presented in this case.

In *Love,* this Court referred to the inappropriateness of procedural technicalities in "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (404 U.S. at 526), and specifically found that a procedure, whereby a charge filed with the EEOC prior to exhaustion of the state remedy was referred by it to the state agency, and then *formally* filed once the state agency declined to take action, fully complied with the intent of the Act. *Id.* at 425. Thus, this

[10] Reference by petitioner to Explanation of Procedures by Representative Dent (Pet. Br., pp. 31-37) is not sufficient to overcome the clear meaning of the Section-by-Section Analysis. The portions of quoted material are from a larger text, in which Rep. Dent *paraphrased* the procedures under Section 706. 118 Cong. Record—House 7564. Moreover, there is no reason to attribute to Rep. Dent, a leading proponent of measures to broaden the reach of Title VII, any effort to narrow its application.

Court disposed of any question of the order in which filing must occur, or that a second "filing" by the aggrieved party was required.

In *Vigil,* the 10th Circuit held that a valid charge could be filed with EEOC during the state deferral period, despite the employer's contention that a literal reading of §706(c) would prohibit "filing" during the 60-day period. *Vigil,* referring to *Love,* allowed §706(e) filing to occur upon initial receipt of the charge, while maintaining untouched the 60-day deferral required by Section 706(c). 455 F.2d at 1224.

Despite contemporaneous decisions to the contrary, Congress in 1972 expressly referred to *Love* and *Vigil* as the judicial interpretations upon which it was relying as providing the construction of §706(c). This legislative history thus establishes that a complainant in a deferral state may come *first* to EEOC; that EEOC may file the charge with the state agency, while holding it in "suspended animation" during the deferral period; and that, for §706(e) purposes, the charge is deemed filed upon initial receipt by EEOC.

B. *EEOC Interpretation.*

In interpreting Section l4(b) of the Age Discrimination in Employment Act (ADEA) in *Oscar Mayer & Co.* v. *Evans,*[11] this Court referred to the EEOC's interpretation of that Section as "entitled to great deference." 60 L. Ed. at 619, *citing Griggs* v. *Duke Power,* 401 U.S. 424, 434 (1974).

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[11] _____ U.S. _____ 99 S. Ct. 2066, 60 L. Ed. 609 (1979).

The EEOC has taken the consistent positions that a charge is "filed" with it on the day it is received, without regard to the intervening deferral period; and that so long as a charge is actually received by it within 300 days of the alleged discrimination, it is deemed filed no later than the 300th day. The currently applicable EEOC regulations at 29 C.F.R. §1601.13(a) reads:

> the timeliness of a charge shall be measured for the purpose of satisfying the filing requirements of section 706(e) of Title VII by the date on which the charge is received by the Commission.

This interpretation is consistent with the administrative policy followed by EEOC from its inception. While EEOC does not begin to process a charge until the state agency has had sixty days of exclusive jurisdiction, it treats all charges received by the 300th day as having been filed within the limitations period.

In the copy of its Regulations, attached as an Exhibit to the Legislative History of the Equal Employent Opportunity Act of 1972, the following 1968 provision is found:

> §1601.12 Referrals to State and Local Authorities
>
> In cases where the document is filed with the Commission more than 150 days following the alleged act of discrimination but less than 210 days therefrom, the case shall be deferred pursuant to procedures set forth above: Provided, however, That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed

with the Commission on the 209th day following the alleged discrimination and will commence processing the case.

33 F.R. 16408, (1968). The Commission's interpretation has been unvarying, although embodied in a succession of regulations, and is therefore entitled to great deference by this Court. *Oscar Mayer & Co.* v. *Evans,* 60 L. Ed. at 619.

C. *A Restrictive Interpretation Of §706(e) Is Contrary To Legislative Purposes.*

There is no evidence that Congress considered the public interest in the enforcement of Title VII secondary to the goal of quick administrative action. Indeed, the record points to a recognition that, while delays in the system were unfortunate, fulfillment of Title VII goals was the first priority.

Either the 240 or 180 day limitation urged by Mohasco would significantly interfere with vindication of Title VII rights and would contravene this Court's policy against "engraft[ing] on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798-799 (1973).

Workers in states with deferral agencies have rightfully relied on those time limits for filing which EEOC deems appropriate. Courts have repeatedly referred to the fact that the average Title VII plaintiff is without counsel and education. But even a literate person such as respondent in this case cannot be expected to do more than consult the administrative agencies for

advice.[12] Had he inquired of the state and federal agencies serving his community as he did, (Silver worked in Amsterdam, New York; and the closest office of EEOC is in Buffalo and the State Division in Albany), he would have *correctly* been told that he was required to file with the State Division within one year from the date of his discharge,[13] and that he was required to file with EEOC within 300 days (as EEOC's regulations interpret the statute). Under those circumstances, what in the legislative history, or what possible construction of the statutory provision, justifies denial to him of access to the federal court?

The response by proponents of a restrictive reading of Section 706(c) is, anomalously, "equity": why should Silver, or any resident of a deferral state, have a longer EEOC filing time than do residents of non-deferral states? The simple answer is that by statute, and administrative rule, they have been led to believe that they do.

"Diligence" is another catchword used to favor restriction. Unquestionably, 180 days, 240 days, or 300 days are in themselves severely restrictive when measured against the average statutes of limitations for

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[12] The District Court mistakenly and without any support in the Record, stated that Silver was represented by counsel at some point during the proceedings before EEOC. (Cert. Pet. App. A11). Silver's letter to the EEOC (App. 3-5) is clearly his own work; his District Court complaint was filed *pro se.*

[13] New York Executive Law §297(5) (McKinney Supp. 1977). Time limitations for filing employment discrimination claims with state agencies range from Utah's 30 days to California's one year, with a possible 90-day extension.

bringing of other civil actions. Both by enlargement of the original filing times from 90 to 180 days in nondeferral states and from 210 to 300 days in deferral states, and by express approval of judicial decisions that provided liberal reading of the earlier filing requirements, Congress, in 1972, defined the diligence required for access to federal remedy. The Conference Comittee Report of the 1972 amendments stated:

> Court decisions [which] have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law [are] not intended [to] be in any way circumscribed by the extension of the time limitations in this subsection [§706(e)]. Existing case law . . . and other interpretations of the courts maximizing the coverage of the law are not affected.

Section-by-Section Analysis of the H.R. 1746, *reprinted in* 3 Legislative History of the Equal Employment Opportunity Act of 1972, at 1846.

Consideration of the requirements imposed upon a deferral state resident, even with the most liberal interpretation of the statute, overcomes any sense that he is given a "bonus". An aggrieved person in a deferral state must make his way through three procedural stages before he has a right to sue in the federal court: he must have his claim considered by a state or local agency, regardless of its level of expertise; his claim must then be considered by the EEOC, with the possibilitiy of blind adoption of the state finding; he must wait the statutorily established time before he can obtain a

"right-to-sue," and once he has received the "right-to-sue," he has a limited time within which to file a complaint in the District Court. It is inconceivable that Congress intended to impose any greater standard of diligence than the statutory scheme now demands.

D. *This Court's Decision In Oscar Mayer & Co.* v. *Evans Supports The Decision Of The Second Circuit.*

This Court's recent decision in *Oscar Mayer & Co.* v. *Evans, supra,* further supports the result reached by the Second Circuit in this case. This Court, in construing Section 14(b) of the ADEA characterized it as patterned after, and virtually *in haec verba* with, Section 706(c) of Title VII. The Court emphasized the distinction between 14(b) which, as does Section 706(c), insures the statutory purpose of allowing a state or local agency the first opportunity to resolve complaints of employment discrimination, and Section 626(d) and (e), the ADEA counterpart of Section 706(e), which function as a limitation against stale claims. In holding that a plaintiff's failure to file with the state agency within the state statute of limitations could not deprive a plaintiff of a *federal* remedy, the Court said:

> The ADEA's limitations periods are set forth in explicit terms in 29 U.S.C. §§626(d) and (e). Sections 626(d) and (e) adequately protect defendants against stale claims. *We will not attribute to Congress an intent through §14(b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state-age discrimination statutes of limitations.*

60 L. Ed. at 619-620.

This Court has thus directed that deferral provisions of ADEA (and by clear implication, those of Title VII) not be construed as to defeat the substantive protections which both Acts afford victims of discrimination.

II. Assuming *Arguendo* That Section706(e)Is Held To Require Filing In Deferral States In Fewer Than 300 Days, Equitable Principles Must Be Applied To Prevent Loss Of Access To The Federal Courts.

Respondent's position is that the deferral procedures followed by EEOC in this case are consistent with the Commission's power to adopt regulations to implement Title VII, but that, even if the procedure as applied in this case is not valid, complainants who have made reasonable efforts to invoke their Title VII rights should not be barred from the opportunity to seek enforcement of those rights. Courts have recognized that a tolerant attitude toward procedural error is particularly appropriate because of Title VII's remedial purpose and the nature of its intended beneficiaries.

Thus, Title VII time limitations should be treated as statutes of limitation rather than as jurisdictional prerequisites.[14] Acceptance of this view will permit courts

[14] Terminology used in referring to Title VII's time periods has varied: some cases use "jurisdictional"; others refer to the time periods as "statutes of limitations." The lack of consistency is evident from comparison of, *e.g.*, *United Air Lines* v. *Evans*, 431 U.S. 553, 560 (1977), *International Union of Electrical Workers* v. *Robbins & Myers*, 429 U.S. 229, 240 (1976) with *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385, 392 and n. 11 (1977), and *Occidental Life Insurance Company* v. *EEOC*, 432 U.S. 355, 371-72 (1977).

more flexible construction, and will prevent the loss of valuable rights to the employee who becomes victim of bureaucratic tangle.[15] In *Occidental Life Insurance Company* v. *EEOC*, 432 U.S. 355 (1977), this Court, in discussing the issue of what time limitation, if any, should be imposed on the EEOC to bring suit against a private employer, commented upon the time limitation periods of Title VII:

> The fact that the only *statute of limitations* discussions in Congress were directed to the period preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure--a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a *statute of limitations,* is not the last phase of the multi-stage scheme, but the commence-

[15] "A case of employment discrimination may require a party to refer to the United States Code for the first and only time in his life. An intelligent but isolated reading of section 706(e) could easily lead one to believe that 300 days is the time limitation for filing an initial claim with the EEOC. A complainant should not be penalized for Congressional ambiguity, or because he does not possess the reading ability of one trained in statutory interpretation. This indeed is the level of skill required to find the 'hidden' 240-day limitation advocated by the district court in *Silver.*" Schaff, *Title VII: Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint Is Received by EEOC Within the 300-day Limitation of* § 706(e), 55 N.Dame Lawyer (to be published April 1980).

ment of the proceeding before the administrative body.

Id. at 372 (emphasis added) *see also Burnett* v. *New York Central Railroad Company,* 380 U.S. 424 (1965).

Employers who complain of the possibility of "stale" claims in deferral states can, in fact, show no prejudice by operation of the procedures used in this case. Whether Mohasco received notice of Silver's complaint through the State Division rather than EEOC, it cannot complain of lack of notification.[16] No employer with a sufficient number of employees to be within EEOC jurisdiction should be able to assert that it has destroyed personnel records within one year. Mohasco's notification from EEOC, *after* the 60 day deferral period to the State Division expired, was less than one year from the date of Silver's termination. (App. 17). Mohasco could not show that it was prejudiced by the procedures followed in this case. Indeed, if Silver had filed only with the State Division, within its one year statute, Mohasco would have received later notice than it did.

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[16] Notice by EEOC to an employer of charges filed with EEOC was not mandatory prior to the 1972 amendments. *Compare* P.L. No. 92-261, 1972 U.S. Cong. & Admin. News, p. 124, *with* P.L. No. 88-352, 1964 U.S. Cong. & Admin. News, pp. 309-311.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Second Circuit Court of Appeals be affirmed in all respects.

Respectfully submitted,

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